UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MICHAEL STAPLETON ASSOCIATES
d/b/a MSA SECURITY

and Case 15-CA-232136

RICHARD DeLEON
An Individual

Bryan Dooley, Esq., for the General Counsel.
David I. Weissman and Brittany L. Stepp, Esqs. (Eckert Seamans Cherin & Mellott, LLC, Philadelphia, Pennsylvania and White Plains, New York) for the Respondent.

DECISION

STATEMENT OF THE CASE

Arthur J. Amchan, Administrative Law Judge. This case was tried via Zoom video technology on March 16 and 17, 2021. Richard DeLeon filed the initial charge giving rise to this case on December 3, 2018 alleging that Respondent discriminated against him by suspending him in order to discourage union activities or membership. This charge was served on Respondent on December 6, 2018. DeLeon filed an amended charge on December 13, 2018 alleging among other things that Respondent violated the Act by discharging him on about December 7. DeLeon filed a second amended charge on March 28, 2019 and a third on May 7, 2019. The General Counsel issued a consolidated complaint on October 22, 2019 regarding this case and cases 15-CA-232787 (Brandon Hawkins, Charging Party) and 15-CA-243480 (Gerald Coleman, Charging Party).

The hearing, initially scheduled for February 10, 2020 was postponed indefinitely on December 20, 2019. 15-CA-243480 (Gerald Coleman, Charging Party) settled in April 2020. The trial was rescheduled for May 4, 2020 and then postponed due to the COVID-19 pandemic.

15-CA-232787 (Brandon Hawkins, Charging Party) settled in July 2020. In January 2021, the hearing via Zoom was set for the instant case.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Michael Stapleton Associates (MSA) a corporation, has offices and operates in New York and Memphis, Tennessee as well as in other locations. It annually performs services valued in excess of $50,000 outside of the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Federation of K9 Handlers (the Union) which represented Richard DeLeon at the time of his discharge, is a labor organization within the meaning of Section 2(5) of the Act.

The General Counsel alleges that Respondent violated the Act with regard to Richard DeLeon in the following manner:

Issuing DeLeon a write-up on November 23, 2018 in violation of Section 8(a)(1) of the Act.

Suspending DeLeon on November 29, 2018 in violation of Sections 8(a)(3) and (1) of the Act.

Discharging DeLeon on December 4, 2018 in violation of Sections 8(a)(4), (3) and (1) of the Act.

For the reasons stated herein I find that Respondent violated the Act in suspending and discharging DeLeon, but not in writing him up.

II. ALLEGED UNFAIR LABOR PRACTICES

Richard DeLeon's employment with MSA

Respondent hired Richard DeLeon as an Explosive Detection Canine Handler (EDCH) in April 2018. Beginning in mid-2018, the canine handlers at Memphis were represented by the United Federation of K9 Handlers.

[1] While I have considered witness demeanor, I have not relied upon it in making any credibility determinations. Instead, I have credited conflicting testimony based upon the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *Panelrama Centers,* 296 NLRB 711, fn. 1 (1989).
Tr. 54, line 18 should read November, not December.

DeLeon had 8 years prior experience with explosive detection dogs. Initially DeLeon spent several weeks training at MSA's facility in Windsor, Connecticut. During that training he was paired with a female German Shephard named Yerbi. At the end of his training DeLeon signed an EDCH handler agreement and took Yerbi to Memphis, Tennessee. DeLeon and Yerbi were assigned to the Fed Ex facility at the Memphis airport screening freight for explosives. When off duty, Yerbi stayed with DeLeon at his home.

Initially, DeLeon was on the night shift, but in August switched to the day shift. Tracy McDonald, MSA's manager at the Memphis facility, was DeLeon's immediate supervisor on day shift. I credit the testimony of current employee Kyle Patterson that McDonald on at least several occasions made disparaging remarks about the Union and its supporters.[2]

DeLeon's October 2018 complaint about hours and assignments

DeLeon testified that in October he complained to McDonald, that he was not getting enough hours of work. DeLeon testified further that he told McDonald that this was due to his being assigned too often to inspect heavy freight as opposed to the boxed freight.[3] DeLeon also testified that he had discussed this concern with fellow dog handler Kyle Patterson before meeting with McDonald. McDonald testified that she does not recall such a meeting.

There is no evidence that DeLeon told McDonald that he was seeking a change on behalf of Patterson, as well as himself. He testified that he sent McDonald an email on October 24. She testified that she does not recall receiving it. However, McDonald conceded that she could have received the email and deleted it. This email does not mention that he is asking for more equitable allocation of assignments on behalf of anyone but himself, G.C. Exh. 3.

Deleon testified that McDonald's response was that two more senior dog handlers, Rebecca Gonzalez and Quinton McCloud, would not work on heavyweight freight because of their seniority. According to DeLeon he told McDonald, that he would go ahead and make his request in writing to the Union, Tr. 163-64. McDonald testified that she does not recall that, Tr. 50. Given the fact that DeLeon attempted to contact the Union on October 24, I credit DeLeon, G.C. Exh. 6. I also rely on the very peculiar and unexplained secret write up that McDonald ostensibly authored on November 8, G.C. Exh. 2, discussed below, that she had animus towards DeLeon as a result of his informing her that he was seeking union assistance. There is no credible alternative explanation for McDonald's conduct in this record.[4]

Union Secretary Tom Brown informed DeLeon on November 3, that the Union had asked MSA's Ethics Officer, Jon Hanson, to initiate an investigation. There is no evidence as to

[2] The fact that McDonald was active in a police union before coming to MSA is irrelevant as to her attitude towards the Union as a member of management.

[3] The heavy freight is shrink-wrapped and placed on pallets, as opposed to the boxed freight which is loaded into containers and sealed.

[4] The dating of several documents by McDonald is very peculiar, raising doubt in my mind as to whether they were written as she testified and whether higher-level managers had input in these documents.

whether Hanson did so or communicated with anyone in MSA management in Memphis.[5] Other employees, including Gonzalez and McCloud were assigned to Heavyweight more often after DeLeon complained.

Verbal Warning regarding DeLeon's inquiry about using an electronic collar

On November 7, 2013, McDonald held a meeting with a number of the dog handlers to prepare for their certification by, I assume, an independent agency, the National Police Work Dog Association. DeLeon asked McDonald and trainer Bob Hynek whether he could use an electronic collar on Yerbi to prevent Yerbi from showing aggression when sniffing cans and boxes during the certification test.[6] McDonald and Hynek told DeLeon that this was strictly forbidden and could result in termination.[7] DeLeon replied that he understood.

The next day McDonald and Hynek again told DeLeon that MSA forbit the use of electronic collars and if a handler used such a collar, it could result in discipline. It is unclear why McDonald brought the subject up again. She memorialized these conversations in a Notice of Disciplinary Action (a documented verbal warning) which she never presented to DeLeon and of which he was not aware of until preparing for the instant hearing. McDonald placed the document in DeLeon's personnel file. Given the lack of an explanation for this verbal warning, I conclude that McDonald bore animus towards DeLeon on account of his intention to involve the Union in the scheduling for heavyweight freight. There is no alternative explanation for this warning in the record.

DeLeon "corrects" Yerbi on November 23, 2018

On November 23, 2018, DeLeon and dog handlers Rebecca Gonzalez and Quinton McCloud reported for work at about 7:00 a.m. Gonzalez was assigned to inspect heavy freight; McCloud and his dog were assigned to inspect boxed freight headed to Europe and DeLeon and Yerbi were assigned to inspect boxed freight headed to Alaska and China.

In preparation for his assignment DeLeon "calibrated" Yerbi. This entailed leading her along a line of cans to insure that she responded correctly when detecting an explosive odor. At this time DeLeon had a flat collar on Yerbi that had been issued by MSA and a "choke collar" that he obtained elsewhere. Other MSA handlers at Memphis have used a choke collar, Tr. 336-37; although according to MSA's Chief Trainer, Mike Wynn, they are never authorized to do so, Tr. 395-96. However, MSA has never discharged a dog handler for using a choke chain.

Yerbi properly identified the odor by sitting passively. As is normal protocol, DeLeon rewarded Yerbi by giving her a ball.[8] However, Yerbi did not drop the ball as she was supposed

[5] The record does not indicate where Hanson's office is located.

[6] DeLeon testified at length about Yerbi's aggressiveness. Kyle Patterson testified that Yerbi charged Patterson's son at DeLeon's home. There is no credible evidence that MSA was aware that Yerbi was an aggressive dog that required special handling.

[7] Paragraph 10 of the EDCH agreement signed by DeLeon in April 2018 forbids the use of a canine pinch collar, canine harness, electronic collar, canine jacket, dog sweaters and dog vests. It does not explicitly forbid a choke collar such as that used by DeLeon on Yerbi.

[8] German Shepherds are rewarded with a ball or toy. Labrador Retrievers are rewarded with food.

to. DeLeon then pulled Yerbi up off her front legs with the choke chain to try to get her to drop the ball. Eventually he swung her around on her leash with considerable force until she dropped the ball. Then he put Yerbi in the back of his van to prepare for the trip to the box line. According to MSA witnesses, DeLeon should have had a second ball or toy to offer Yerbi, so she would drop the first ball. He did not have a second ball with him.

This incident was recorded by a Fed Ex camera Jt. Exh. – 1. Rebecca Gonzalez who observed the incident and appears in the 65-second video, called and then emailed Tracy McDonald complaining about DeLeon's treatment of Yerbi. Gonzalez identified the location of the incident and asked McDonald to review the video of the incident, Exh. R-2. McDonald did not review the video but forwarded the Gonzalez email to her supervisor, Marc Lamberty, an Air Cargo Project Manager, apparently based in New York, on the 23rd, R. Exh. 2, Tr. 69. McDonald also did not examine Yerbi to determine whether she had been injured by DeLeon or take Yerbi away from DeLeon. She continued to allow DeLeon to work with Yerbi for almost another week.

McDonald gives DeLeon a written warning on November 23 as the result of his treatment of Yerbi that day.

Lamberty advised McDonald to write DeLeon up. McDonald testified that she presented a written warning to DeLeon on November 28. However, DeLeon testified that McDonald gave him the write-up on November 23. He testified further that he refused to sign it and told McDonald he would not do it [I assume the technique employed on November 23] again, Tr. 184-85. DeLeon continued to work at the Fed Ex facility and take Yerbi home with him until November 29. There are two versions of the written warning, G.C. Exh 4, Exhibit A, on which McDonald's signature is printed and G.C. Exhibit 5. on which McDonald's name is handwritten. The reason for the two versions has not been credibly explained by Respondent. However, both are dated November 23, 2018. I credit DeLeon that he received G.C. 5 on November 23. Also, it stands to reason that if Lamberty told McDonald to write DeLeon up that she would do so the same day.

DeLeon did not receive a written warning on November 28 as a result of the November 23 incident

Respondent introduced an email sent by McDonald to herself on November 26. The email discusses her purported interview of Quinton McCloud on November 23. She states in this November 26 email that she intended to give DeLeon a written warning on November 27, R. Exh. 3, Tr. 119.[9] Similar to the existence of the 2 written warnings, this document is very peculiar and the reason for its existence has not been satisfactorily explained. I conclude that it is an attempt to obscure the fact that McDonald gave DeLeon the warning on November 23. DeLeon's testimony does not corroborate McDonald's assertion that she gave him the warning on November 28.

[9] At Tr. 121 I said, in response to an objection from the General Counsel, that I would give Exh. R-3 little weight. On further reflection, I think the non-hearsay portions of the document are relevant to establish that even after Marc Lamberty was aware of the November 23 incident, there was no plan to suspend and discharge DeLeon.

DeLeon is suspended on November 29 as a result of the November 23 incident. DeLeon contacts the Union again for assistance.

On November 29, McDonald, Teresa Brignole and Tony Grassi, MSA trainers/supervisors went to the office of Sarah Washington, Fed Ex Regional Manager for Aviation Security. There, with Washington, they watched the 65 second video of the November 23 incident for the first time.

McDonald testified that her side of the investigation of the November 23 incident ended on November 28. However, according to McDonald, Washington called her and asked McDonald to come to Washington's office on November 29, Tr. 75-76. This is inconsistent with Respondent's December 18, 2018 position statement in this matter. That document, which must have been prepared after consultation with McDonald, states that:

> The next day, on November 29, 2018, McDonald continued to investigate and spoke to Washington. When discussing whether there was video footage of the incident, Washington told McDonald she would need to come to the FedEx facility to review the video in person. When McDonald went to FedEx that afternoon, she was accompanied by MSA Supervisor Teresa Brignole and MSA Trainer Tony Grassi, who were also permitted to review the video. Upon review, it became apparent that DeLeon had used excessive force on Yerbi. Washington, in full agreement, informed McDonald that DeLeon would need to be escorted off the premises.

G.C. Exh. 4, p. 2.[10]

Respondent's Exhibit 4 also does not indicate that it was Washington who initiated the meeting with McDonald on November 29. I find that she did not.[11]

McDonald, Washington, Brignole and Fed Ex security personnel went to DeLeon's post and escorted him to McDonald's office. Washington took away his Fed Ex credentials and McDonald took away his MSA credentials and suspended him. Teresa Brignole took Yerbi to her home. On his way to the Fed Ex office, De Leon called Tom Brown, the Union's Secretary,

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[10] That DeLeon used what some would consider excessive force is apparent from Gonzalez's November 23 email and McDonald's interview of Quinton McCloud, Exhs. R-2 and R-3 as well as the written warning given to De Leon on November 23, G.C. Exhs 4, Exhibit A and G.C. Exh. 5.. One did not have to view the video to come to such a conclusion. I infer there was some internal communication between McDonald and higher-level MSA managers between November 23 and her meeting with Washington, about which there is no evidence in this record.

It is well-settled Board law that position statements from a Respondent's counsel are admissible and may be relied on when inconsistent with the testimony of a Respondent's witnesses, *Albion Poultry and Egg Company,* 134 NLRB 827, *Steve Aloi Ford, Inc.,* 179 NLRB 229, fn. 1; fn. 2 (1969).

[11] I also find McDonald to be a generally incredible witness. I do so not only on the inconsistency of her testimony with Respondent's position statement, but other obviously false testimony. For example, McDonald's testimony at Tr. 125 that she was not aware of the video until November 29 is false. Rebecca Gonzalez' November 23 email made it clear to her that the incident was on camera..

and stated that he believed he was about to be suspended. DeLeon kept Brown on his speakerphone. McDonald told Brown that DeLeon was being removed from the Fed Ex property, Tr. 133.

At the end of the meeting in her office, McDonald informed DeLeon that MSA would be in contact with him to let him know whether or not he was coming back to work, Tr. 204, R. Exh. 4. DeLeon asked if he could be paired with a different dog. Thus, it is clear that when DeLeon left the Fed Ex property on November 29, he had not been terminated.

DeLeon files a charge regarding his suspension.
DeLeon is discharged.

On December 3, 2018, DeLeon filed the charge in this matter. In it he alleged Respondent suspended him in order to discourage union activities or membership in violation of Section 8(a)(3) and (1) of the Act. Tracy McDonald and others at MSA became aware DeLeon filed a charge after 4:09 on December 3, R. Exh. 6; Tr. 88.[12]

Whoever decided to terminate DeLeon did not testify in this hearing. That person was clearly not McDonald and very unlikely was Lamberty, who after learning of the November 23 incident only advised McDonald to write DeLeon up. The fact that Lamberty communicated the termination decision to DeLeon does not establish that he made the termination decision. In this regard, McDonald testified,

> A. Yes, a decision was made above me that he was terminated
>
> Q. Okay, who told you that?
>
> A. Marc Lamberty.
>
> Tr. 135.

McDonald did not testify that Lamberty made the termination decision or that Lamberty told her that he had made the termination decision. I conclude she used the passive voice to obfuscate the identity of the decision-maker if she knew who that individual was. See, e.g., *Allied Mechanical Services, Inc.,* 341 NLRB 1084, 1110, 1122 (2004).

Even if he was the decision-maker or one of the decision makers, there is no explanation as to how a written warning turned into a discharge. Lamberty had all the relevant facts about the incident on November 23.

Lamberty did not testify in this proceeding. In its brief, Respondent states that Lamberty no longer works for MSA. There is nothing to that effect in this record.

[12] I assume Brown's email was sent at 4:09 p.m. eastern time, although Memphis is in the central time zone.

It is settled "that when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines,* 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). I draw such an adverse inference from Respondent's failure to call as a witness a person who was likely to know who made the decision to terminate DeLeon, why it was made and when it was made. That inference is that DeLeon's appeals to his union for assistance was a motivating factor in Respondent's decision to suspend and later discharge him.

There is also no evidence in this record as to why someone at MSA decided to fire DeLeon after McDonald and Lamberty initially failed to do so. Respondent contends it was obligated to terminate DeLeon because Fed Ex's Sarah Washington insisted on it. However, Washington did not testify in this proceeding. There is no evidence as to how Washington became aware of the November 23 video and what communications she may have had about the incident prior to November 29.[13] McDonald testified that she did not ask Washington to look at the video and so did Gonzalez, Tr. 340-41, 424. Regardless of whether this testimony is true or not, I decline to conclude that the impetus to terminate DeLeon came from Fed Ex.

Marc Lamberty apparently prepared a termination letter for DeLeon dated December 4. DeLeon testified that he never received it. According to DeLeon, the first he learned of his termination was from a telephone call from Marc Lamberty on December 7, Tr. 204-05. Lamberty told DeLeon that he was being terminated because he had abused his dog.[14]

DeLeon's charge was formally served on MSA on December 6. He filed an amended charge on December 13, 2018, alleging that Respondent violated the Act in discharging him on December 7.

Record evidence as to whether DeLeon committed animal abuse

Respondent asserts that DeLeon was guilty of animal abuse as that term is commonly understood. To this judge, DeLeon's handling of Yerbi appears to be unnecessarily violent—particularly when he swings the dog around by his leash.

This record indicates that while many would consider DeLeon's handling of Yerbi to constitute animal abuse that opinion is not universal. Mike Wynn, MSA's chief dog/handler trainer characterized DeLeon's handling of Yerbi, as "part of the old school of compulsion," Tr. 361, and stated that it is still used by other companies, Tr. 396. He also was hesitant to declare DeLeon's conduct as obvious animal abuse. While extremely critical of DeLeon while watching the November 23 video and testifying to physical damage that could have resulted, Wynn at one point testified, "And again, it's a severe correction. It's -- it's almost leading to abuse of the dog," Tr. 364.[15]

[13] Rebecca Gonzalez testified that she spoke to Washington, Tr. 336. However, there is no evidence as to when she spoke to Washington or what was said. Moreover, she testified that she never discussed the November 23 incident with anyone at Fed Ex and is unaware as to how Sarah Washington became aware of it, Tr. 340-41.

[14] The December 4 letter gives the same reason for DeLeon's discharge.

[15] At Tr. 369-70, Respondent's counsel led Wynn to testify that DeLeon's conduct constituted abuse

Nevertheless, DeLeon's manner in handling Yerbi on November 23, does appear to be inconsistent with MSA's general philosophy of how to train an EDC. Wynn testified at Tr. 355-56.

> So behavior modification for all of the play reward dogs is operating conditioning. So it's basically the fact that the dog is provided explosive odor. If he correctly indicates to it, he's given his reward.
> In the operating conditioning, it -- in the true science of that, if the dog is incorrect, there's supposed to be some sort of corrective measure. But here at MSA, we don't apply that at all. What we want to do is, whether it's a Labrador or a German Shepherd or a Malinois, we teach the positive reinforcement method. And with that positive reinforcement method, it's teaching the dog the method and learning the method always in a positive fashion. Once the dog actually learns it, he retains it much better and is a much happier, solid working dog.

Respondent's expert witness, Dr. Kwane Stewart, also testified that choke collars are still fairly commonly used by some trainers despite his opinion that excessive or repeated force can damage the dog's airway, Tr. 406.

> It [compulsion training] -- it's a type of force training where there are corrective measures used for training, so you know, collar corrections, for example, where you -- you jerk the leash on the choke chain to get the dog's attention. It's -- it's a method that can be effective when used the right way, although the consensus these days is, amongst veterinarians and trainers, is it's dated. And it's unnecessary to motivate working dogs to get the desired effect. We've -- we've seen that now time and time again over the years, that a lot of these force training, compulsion training, methods are not necessary. In fact, they have a stronger work -- work ethic when you employ positive reinforcement.
>
> going back to compulsion training, that, when it is used and used properly, there should still be some, what you could say or call, quote unquote, positive punishments whereby there's a collar correction, for example, and then following that, a reward or a treat is offered to the pet.

Tr. 408.

> But with regard to this particular video, you have no doubt that what you're witnessing and what you're viewing is animal abuse and animal cruelty?
> A Yes. Yes, and -- and I -- I will add that the -- the tightening of what is considered abuse has progressed year after year, particular in California. I can't speak to other states, but it -- it's evolved quite a bit in the time that I've served –

Tr. 416.

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or neglect. Pursuant to paragraph 17 of MSA's EDHC handler agreement, abuse or neglect of the canine will result in immediate termination of the Agreement, See Exh. R-1, signed by DeLeon on April 25, 2018.

JUDGE AMCHAN: Well, I think what you're saying is that something that may have [been] considered okay 15 years ago would be considered animal abuse now.
THE WITNESS: That's correct. Thank you.

Tr. 417.

Analysis

General Principles

In order to establish a violation of Section 8(a)(4) and/or (3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

Improper employer motivation may be inferred from circumstantial as well as direct evidence. *NLRB v. Link-Belt Co.,* 311 U.S. 584, 602, 61 S.Ct. 358, 367, 85 L.Ed. 368 (1941); *Birch Run Welding,* 761 F.2d 1175 at 1179 (6th Cir. 1985). Discriminatory motivation may reasonably be inferred from a variety of factors, such as the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for discharge and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in implementing the discharge; and proximity in time between the employees' union activities or other protected activity and their discharge. *La Gloria Oil and Gas Co.,* 337 NLRB 1120 (2002); *Metro Networks, Inc.,* 336 NLRB 63 (2001). A discharge following closely on the heels of protected activity is particularly powerful evidence of discrimination, *Jim Causley Pontiac v. NLRB,* 620 F.2d 122, 126 (6th Cir.1980).

Generally, to establish illegal motive the General Counsel must show that the discriminatee engaged in union or other protected activity, that the Respondent knew of that activity, and bore animus towards that activity sufficient to draw an inference that the employer was motivated by the protected conduct to take the adverse action against the employee. In *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 1 (2019), the Board held that "to meet the General Counsel's initial burden [under *Wright Line*], the evidence of animus must support a finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee." [16]

[16] I am well aware that Board precedent has gone back and forth as to whether the General Counsel's initial burden includes demonstrating a causal relationship between the protected activity and the adverse action. Regardless, the outcome of this case does not depend on whether there are 4 elements to the General Counsel's initial burden or 3.

Applying the "Wright Line" test to this case

Protected Activity

October 2018

Richard DeLeon complained to Tracy McDonald that his regular assignment to heavyweight freight was adversely affecting the number of hours he worked and that other handlers should share more equitably in doing this work. The fact that he may have been incorrect regarding the allocation of work is irrelevant to whether his complaint was protected, *ARO, Inc.,* 227 NLRB 243 (1976); *Woodings Verona Tool Works,* 243 NLRB 472 (1979). He told McDonald that he would seek the assistance of the Union regarding this issue. I infer Respondent's animus towards DeLeon's union activity from the completely unexplained and secret verbal warning drafted by McDonald on November 8 and placed in DeLeon's personnel file and the unexplained escalation of his discipline for the November 23 incident from a warning to a discharge..

Call to the Union on November 29.

DeLeon clearly engaged in protected conduct by seeking union assistance after being removed from his post and while on the way to McDonald's office on November 29. However, the suspension that he received when he was in McDonald's office was clearly in the works before he called the Union.

Filing of the Unfair Labor Practice Charge on December 3

DeLeon filed an unfair labor practice charge over his suspension on December 3. Respondent became aware of this charge on December 3. DeLeon was not told that he was terminated until after he filed the charge. However, it is not clear whether the decision to terminate DeLeon was made before or after MSA was aware of his ULP charge.

Knowledge of DeLeon's protected activity

Respondent was aware DeLeon sought union assistance in October about what he believed were inequitable work assignments. It was clearly aware of DeLeon's call to the Union on November 29. It may or may not have been aware of his filing of the charge on December 3 before it terminated him. However, that is not clear because this record does not establish who decided to fire DeLeon, when that decision was made and for what reason. The decision to terminate was clearly not made by any of the MSA witnesses who testified in this hearing.

Animus towards DeLeon's protected activity

Testimony from current employees, such as Kyle Patterson as to statements made by Tracy McDonald, tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978).

I credit Patterson's uncontradicted testimony that McDonald on at least several occasions characterized the employees' unionization choice as futile and characterized the union's supporters as "just a lot of upset handlers that were upset with MSA and were trying to do everything they could to get back at MSA," Tr. 256-57.

I also infer animus from McDonald's authorship of the completely unexplained verbal warning secretly placed in DeLeon's personnel file on or about November 8, as well as the abrupt and unexplained escalation of his written warning to a discharge..

There is also evidence of disparate treatment with regard to DeLeon's termination. An explosive detection dog died after Ahmed Ali, another Memphis dog handler, left it outside in extreme heat at his residence, Tr. 392-95. Ali was allowed to transfer from Memphis to New York, albeit not to a dog handler position. Respondent has not adequately distinguished DeLeon's situation from that of Ali. There is no evidence in the record demonstrating that Ali was not at fault in the death of the dog assigned to him or that he engaged in any union or other protected activity.

The Tschiggfrie Properties causal connection

I find there is sufficient evidence to satisfy the General Counsel's initial burden under Tschiggfrie Properties.

While there are some peculiarities about the written warning presented to DeLeon about the November 23 treatment of Yerbi, I dismiss this complaint item. There is substantial evidence that MSA considered DeLeon's treatment of Yerbi to be improper.

With regard to the suspension, it is clear that DeLeon was in serious trouble even before he asked the Union for help on November 29. He believed he was about to be suspended when he called the Union and I infer a decision to suspend him and take away his MSA credentials and Fed Ex credentials may have been under consideration or already made. However, Respondent, by McDonald, was aware of DeLeon's intention to seek union assistance in October. Moreover, there is no explanation as to how and why DeLeon's discipline escalated from a warning to a suspension between November 23 and November 29 and then a discharge. This abrupt and unexplained escalation of the discipline for the November 23 incident is persuasive evidence of pretext, animus and discriminatory motive, *Lucky Cab Co,* 360 NLRB 271, 274 (2014) enfd. 621 F. Appendix 9 (D.C. Cir. 2015).

With regard to DeLeon's discharge, MSA knew of his request for union assistance on November 29 and the Union's attempt to participate in the meeting in McDonald's office. MSA may have known that DeLeon filed the ULP charge over his suspension before terminating him. However, this is not certain because the record does not reflect who made the termination decision or when it was made. If the termination decision was made immediately after MSA learned about the ULP charge, that would satisfy the General Counsel's initial burden of persuasion, *Jim Causley Pontiac v. NLRB,* 620 F.2d 122, 126 (6th Cir.1980). Moreover, under *Wright Line,* once the General Counsel established that DeLeon filed an unfair labor practice and then was terminated in close proximity to that filing, the burden is on MSA to prove that the termination decision was made before it was aware of the ULP charge; this it did not do.

There are some glaring holes in the evidence surrounding Respondent's discipline and termination of DeLeon. Number 1 is its failure to call any of the decision-makers to testify as to why misconduct worthy of only a written warning later became worthy of suspension and discharge. It's failure to provide documentation, or call Sarah Washington, or another Fed Ex official as a witness, is a failure to establish that MSA was obligated by Fed Ex to take further action against DeLeon.[17] Indeed, there is substantial evidence in this record indicating this was not the case.

There is thus no credible evidence as to why the November 23 incident merited discharge in addition to the warning administered by McDonald on November 23.[18] There is no evidence as to what changed between November 23 and November 29 apart from the fact that McDonald went to Sarah Washington's office.

Without Washington's testimony or documentation, the record is silent on how Washington found out about the November 23 incident; whether she or somebody else made the decision to bar DeLeon from Fed Ex property and whether she discussed this matter with anyone from Fed Ex or MSA before meeting with McDonald. Even McDonald's testimony contains a hint that Fed Ex and MSA removed DeLeon from the property at the behest of MSA.

> I did not suspend him. After we watched that video and -- we were all just in shock: me, Tony, Sarah, and Teresa -- when we saw the abuse of that dog, we were appalled. And we told -- we told Sarah that's totally unacceptable. And she was very upset. She was livid and mortified, basically. When she saw that video of Rick choking that dog, she demanded he be removed from the property immediately. And we went to his post and got him out of there.

Tr. 77-78.

This testimony indicates that Washington had not seen the video prior to viewing it with McDonald on November 29. Thus, there is no explanation for why Washington would summon McDonald to her office concerning DeLeon and the November 23 incident.

In summary, given the adverse inference I draw from Respondent's failure to call its managers who decided to terminate DeLeon, I conclude that the General Counsel has met his burden of proving that Richard DeLeon was suspended and then terminated at least in part for seeking the assistance of the Union and filing an unfair labor practice charge. I find that the General Counsel met his initial burden of persuasion and that Respondent did not meet its burden of proving that it would have suspended and terminated DeLeon even in the absence of his protected conduct.

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[17] I would note that in the era of Zoom, this would not have even necessitated having an MSA official or Lamberty, if he was the decision-maker, travel to Memphis.

[18] Board law is ambiguous as to whether a judge can draw an adverse inference for a party's failure to call a witness who is not under its control or who is available to both parties. I do not draw an adverse inference from Respondent's failure to call Sarah Washington. Rather, I find that Respondent has not established that Fed Ex required it to permanently remove DeLeon from its property in the absence of a suggestion to that effect by MSA.

Conclusion of Law

Respondent, MSA Security violated Section 8(a)(3) and (1) in suspending Richard DeLeon on November 29, 2018 and Sections 8(a) (4), (3) and (1) in discharging him in December 2018.

Remedy

The Respondent, having discriminatorily discharged an employee, must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth C*o., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also compensate Richard DeLeon for any reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, above, compounded daily as prescribed in *Kentucky River Medical Center*, above.

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on his Social Security earnings record. To this end, Respondent shall file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Michael Stapleton Associates, LTD, d/b/a MSA Security, New York, New York and Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from
   (a) Discharging or otherwise discriminating against any employee for supporting or seeking assistance from the United Federation of K9 Handlers or any other union.
   (b) Discharging or otherwise discriminating against any employee for filing an unfair labor practice charge.
   (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.
   (a) Within 14 days from the date of the Board's Order, offer Richard DeLeon full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
   (b) Make Richard DeLeon whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.
   (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter notify Richard DeLeon in writing that this has been done and that the discharge will not be used against him in any way.
   (d) Compensate Richard DeLeon for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.
   (e) Compensate Richard DeLeon for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 15, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.
   (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
   (g) Within 14 days after service by the Region, post at its facility in Memphis, Tennessee copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 29, 2018.

20 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region
(i) attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 23, 2021.

Arthur J. Amchan

Arthur J. Amchan
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in or planning to engage in union or protected concerted activity, including seeking assistance from the United Federation of K9 Handlers, or any other union, or filing an unfair labor practice charge with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Richard DeLeon full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Richard DeLeon whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Richard DeLeon for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Regional Director for Region 15 allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Richard DeLeon for his search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and discharge of Richard DeLeon, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

Michael Stapleton Associates, Ltd., d/b/a MSA Security

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413

(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-232136 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.